Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

SCHUYLER VAN SCOY, Petitioner

v.

SHELL OIL COMPANY, Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An avid outdoorsman with two children was denied standing based on his aesthetic interests under the Endangered Species Act ("ESA") even though he routinely took his children into the marshes and onto bay waters to look for endangered species and other wildlife, and had concrete plans to do the same with his children in the future. The questions presented are:

1. Is the denial of standing for this father's aesthetic interests in conflict with the decision in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)?

2. Whether the Ninth Circuit's denial of standing for this father's aesthetic interests is contrary to holdings in the Fifth, Eighth, and D.C. Circuits.

3. Whether the denial of this father's "aesthetic interest" standing violates due process, irrespective of his lack of "economic interest" standing as a commercial fisherman or seaman.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

SCHUYLER VAN SCOY, Petitioner

v.

SHELL OIL COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY ("Father") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, and requests a waiver of fees under 28 U.S.C. sec. 1916 (1988) since Fisherman is a commercial fisherman or seaman.

OPINIONS BELOW

The opinion of the court of appeal (App., infra, 1a - 4a) is unreported. The opinion of the district court (App., infra, 7a - 14a) is unreported.

JURISDICTION

The court of appeals entered its judgment on Dec. 6, 1996 (App., infra, 5a), after denying a petition for rehearing on Nov. 27, 1996 (App., infra, 6a). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

Section 1540(g)(1)(A) of title 16 U.S.C. (1985) provides, in pertinent part, that "any person may commence a civil suit on his own behalf" to enjoin anyone "who is alleged to be in violation" of the Endangered Species Act ("ESA"), such as one who is causing a "take" of any endangered or threatened species under 16 U.S.C. sec. 1538(a)(1)(B) and (G) (1985).

Sec. 17.3(c) of title 50 C.F.R. (1995) provides, in pertinent part, that "'[h]arm' in the definition of 'take'" includes "significant habitat ... degradation".

Sec. 17.11(h) of title 50 C.F.R. (1995) lists, in pertinent part, the Peregrine Falcon (a bird) and California Clapper Rail (a bird) as endangered species, and lists Winter-run Chinook Salmon (a fish) and Delta Smelt (a fish) as threatened species.

STATEMENT

Father, an avid outdoorsman and father of two children, sued SHELL OIL COMPANY, Respondent, in September 1994 in the U.S. District Court for the Northern District of California under ESA citizen suit provisions in 16 U.S.C. sec. 1540(g)(1) (1985).

Using technical reports from the U.S. Dept. of Interior Fish & Wildlife Service and other government agencies, Father had learned that Respondent's discharge of excessive selenium from its oil refinery into northern San Francisco Bay was degrading the habitat of these endangered and threatened species and, in particular, was causing a "take" because of toxic selenium's adverse affect on reproductive capabilities and embryos of the California Clapper Rail. 16 U.S.C. sec. 1538(a)(1)(B) and (G) (1985); 50 C.F.R. 17.3(c) (1995).

In February 1995, the district court ordered that discovery be conducted to determine Father's standing under the ESA. During his subsequent deposition and in his supporting declaration, Father stated that: (1) he had seen all four of these endangered or threatened species, and wished to see them again; (2) he took routine walks with his children

(and boat trips) to view wildlife, including these four endangered or threatened species; and (3) he planned to continue to take such walks with his children in the future to see these endangered and threatened species.

The district court denied standing and dismissed with leave to amend, based on Father's lack of "economic interest" because he had sold his commercial fishing boat (even though he kept his Master's License). The court of appeals affirmed.

REASONS FOR GRANTING THE PETITION

I. Father had standing based on his aesthetic interests as a parent

Standing under the ESA is recognized for purely aesthetic purposes. The "desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing". Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-563 (1992).

Father, as the party seeking this review, was the one who was injured. Lujan v. Defenders of Wildlife, 504 U.S. at 563.

Father's standing was supported by injury to him that was "particularized" and "imminent" because he will no longer be able to view these endangered and threatened species with his children in the future. Lujan v. Defenders of Wildlife, 504 U.S. at 560 fn. 1, 564 fn. 2.

In his deposition, Father answered a specific question from Respondent in the affirmative regarding his concrete plans to view these endangered and threatened species in the future with his children. Father also made essentially the same statements in his supporting declaration.

Those statements demonstrate that Father had an "particularized" and "imminent" injury because he had concrete plans to view the endangered and threatened species with his children in the future, and had observed them in the past.

The district court and court of appeals simply ignored the facts in Father's deposition and his declaration which

supported his "aesthetic interest" standing under the six specific tests summarized in Region 8 Forest Serv. Timber Purchasers v. Alcock, 993 F.2d 800, 805 (CA11 1993), cert den. ___ U.S. ___, 114 S.Ct. 683 {three constitutional and three prudential tests}.

The court of appeals abused its discretion when it found that: (1) Father "failed to demonstrate that he had any concrete plans to view the endangered species" (App., infra, 3a), and (2) that Father was not "really at all interested in [the endangered species]" (App., infra, 3a), as an individual and a parent. Both Father's deposition and declaration have facts which directly contradict these findings by the court of appeals.

The district court only analyzed Father's economic standing as a commercial fisherman and tour operator, which is a separate and distinct basis for standing under the ESA (App., infra, 7a - 14a). In the Ninth Circuit, a commercial fisherman can have an economic interest in the preservation of an endangered species that also satisfies the standing requirement of the ESA. Pacific Northwest Generating Co-op v. Brown, 25 F.3d 1443, 1450 (CA9 1994), superseded 38 F.3d 1058, 1065-1066 {economic interest acceptable}.

Even though Father's commercial fishing business had some fishing trips for Winter-run Salmon during a very brief salmon fishing season, it also included bird-watching tours during which Father saw a Peregrine Falcon and a California Clapper Rail. 50 C.F.R. 17.11(h) (1995).

The district court and the court of appeals decided that Father's "economic interests" as a commercial fisherman or seaman were insufficient for standing because, when he sold his commercial fishing boat, he no longer had any standing under the ESA (App., infra, 2a and 8a). That was in error.

Those decisions do not change the lower courts' abuse of discretion in ignoring facts supporting Father's "aesthetic interest" standing as a parent.

Irrespective of his economic pursuits as a seaman, Father was interested enough to take his children on walks with him to view those species, interested enough to have future plans to view those species with his children, and interested

enough to bring an ESA action to protect those species from the dangers of Respondent's toxic selenium, all of which clearly support Father's "aesthetic interest" standing.

II. These decisions conflict with those of other districts

The district court's decision and the court of appeal's decision are in conflict with the Fifth, Eighth and D.C. Circuits.

In those districts, Father would have standing under the ESA based solely on his "aesthetic interests" as a parent. National Audubon Society v. Hester, 801 F.2d 405, 407 fn. 2 (D.C.Cir. 1986); National Wildlife Federation v. Coleman, 529 F.2d 359, 361 (CA5 1976), reh den. 532 F.2d 1375, cert den. 429 U.S. 979; Defenders of Wildlife, Friend of Animals & Their Environment v. Hodel, 851 F.2d 1035, 1039 (CA8 1988).

Even the Ninth Circuit has recently followed the Lujan reasoning in Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1351-1355 (CA9 1994), when it recognized the standing of a father who took walks in the forest with his children to view wildlife.

Here, Father took walks in the marshes with his children to view the wildlife as well as to view endangered species.

CONCLUSION

The petition for writ of certiorari should be granted.

Alternatively, in view of the conflict of the decisions below with past decisions of this Court, the Court may wish to consider summary reversal under Sup.Ct.R. 16 (1995) and 28 U.S.C. sec. 2106 (1992).

Respectfully submitted,

Dated: 2-21, 1997

Jeffrey M. Weiss, Esq.
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SCHUYLER VAN SCOY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

SCHUYLER VAN SCOY, Petitioner

v.

SHELL OIL COMPANY, Respondent

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY	)	No. 95-15961
	)	
Plaintiff-Appellant,	)	D.C. No. CV-94-
	)	003327-FMS/WDB
v.	)	
	)	
SHELL OIL COMPANY	)	MEMORANDUM*
	)	
Defendant-Appellee.	)	
	)	

Appeal from the
United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted September 17, 1996
San Francisco, California

Before: CHOY, CANBY, and FERNANDEZ, Circuit Judges

Schuyler Van Scoy appeals the district court's dismissal for lack of standing of his citizen suit against Shell Oil Company pursuant to the Endangered Species Act (ESA) 16 U.S.C. sec. 1540(g)(1)(A). We affirm.

In order to establish standing, Van Scoy bears the burden of proving that he has suffered "an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 55, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (citations and internal quotations omitted). Because he failed to do so, the district court

correctly dismissed his ESA action.

1. Van Scoy first alleges future economic injury from future losses in income to his fishing and wildlife-watching business. However, in his deposition, Van Scoy undermined his first allegation by failing to state that he had any concrete plans to return to the fishing business. He plainly stated that he had sold his boat, that without his boat he could not conduct his business, and that he had no concrete plans to obtain another boat. He also stated that he might some day obtain a boat if he perceived there to be adequate demand for his services. He never, however, stated with any certainty that he had any realistic expectation that there would ever be adequate demand, and he certainly never stated with any certainty when that would be. "Such 'some day' intentions -- without any description of concrete plans, or indeed any specification of when the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require." Lujan, 504 U.S. at 564, 112 S.Ct. at 2138.

Van Scoy attempts to overcome the very significant shortcomings in his assertion of standing by reference to his later declaration. His declaration did state that he had obtained the right to borrow a boat, and intended to get back into business with it. If the declaration meant that he had that plan all along, it simply directly conflicts with his deposition and was properly discredited. See Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 266-67 (9th Cir. 1991). If it meant that after he filed his complaint he developed the plan, that was too late because he must show standing at the time of filing. Lujan, 504 U.S. at 569 n.4, 112 S.Ct. at 2141 n.4; Newman-Green, Inc., v. Alfonzo-Larrain, 490 U.S. 826, 830, 109 S.Ct. 2218, 222, 104 L.Ed.2d 893 (1989).

2. Van Scoy hopes to create an economic interest by asserting that the standing inquiry should relate back to the time that he filed his state tort action against Shell. He hopes in vain because he failed to raise that relation-back argument until his motion for reconsideration. The district court,

therefore, could properly reject the argument because it was not based on newly discovered evidence, did not identify clear error in the initial decision, and was not based on an intervening change in controlling law. See School Dist. No. 1J, Multnomah County v. ACandD, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Moreover, on appeal, Van Scoy presents the theory that standing should relate back to the date on which he provided 60-day notice of the suit. We will not usually consider an argument raised for the first time on appeal. See Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1438 (9th Cir. 1993). There is no reason to do so here.

3. Van Scoy next asserts that he has standing because Shell's release of pollutants has adversely affected his aesthetic interest in viewing the endangered species. The Supreme Court has recognized that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing." Lujan, 504 U.S. at 562-63, 112 S.Ct. at 2137; see also Sierra Club v. Morton, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972) (same). The Supreme Court, however, has required that the party asserting injury to an aesthetic interest demonstrate more than a mere conjectural interest in seeing the animals in the future. Instead, the Supreme Court has required that "the party seeking review be himself among the injured." Lujan, 504 U.S. at 564, 112 S.Ct. at 2137 (quoting Morton, 405 U.S. at 734-35, 92 S.Ct. at 1366). Van Scoy failed to demonstrate that he had any concrete plans to view the endangered species. His own evidence plainly showed that he was not really at all interested in them. He therefore cannot establish an injury to his aesthetic interests.

4. Van Scoy also contends that the district court erred when it declined to allow him to assert third party standing on behalf of the endangered species. Because the species are not named parties, the district court properly characterized Van Scoy's assertion as an argument for third party standing. But to establish third party standing a person must "have a close

relationship to the party whose right [he] is asserting." Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994). That does not describe Van Scoy. Indeed, the record shows that he never made the slightest effort to observe the species for aesthetic reasons although he had liked to catch salmon commercially in the past. People have been permitted to bring suit in an endangered species' own name when they are sufficiently interested to be able to represent the animal itself. See, e.g. Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106, 1107 (9th Cir. 1988) (bird classified as an endangered species under the ESA has legal status and can "wing[] its way into federal court as a plaint in its own right."). Van Scoy has not shown that level of interest either.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

Endorsed file-stamped on Oct. 2, 1996

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY	)	No. 95-15961
	)	
Plaintiff-Appellant,	)	CT/AG#: CV-94-
	)	03327-FMS/WDB
v.	)	
	)	
SHELL OIL COMPANY	)	
	)	
Defendant-Appellee.	)	
	)	

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this be, and hereby is AFFIRMED. Costs taxed.

Filed and entered October 2, 1996.

Endorsed file-stamped on Dec. 6, 1996.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY	)	No. 95-15961
	)	
Plaintiff-Appellant,	)	D.C. No. CV-94-03327-FMS-WDB
v.	)	
	)	ORDER DENYING PETITION FOR REHEARING
SHELL OIL COMPANY	)	
	)	
Defendant-Appellee	)	

Before: CHOY, CANBY, and FERNANDEZ, Circuit Judges

Appellants' petition for rehearing is DENIED.

Endorsed file-stamped on Nov. 27, 1996.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SCHUYLER VAN SCOY,	) No. C 94-3327-FMS
	)
Plaintiff (s),	) ORDER DENYING
	) PLAINTIFF'S
vs.	) MOTION FOR
	) PRELIMINARY
SHELL OIL COMPANY,	) INJUNCTION;
	) DISMISSING
Defendant (s).	) COMPLAINT WITHOUT
	) PREJUDICE

ISSUES

Plaintiff's motion for a preliminary injunction requires the Court to first determine whether plaintiff has standing to seek relief under the Federal Endangered Species Act, 16 U.S.C. sec. 1531, et seq. The Court holds that plaintiff lacks standing personally and as a third-party attempting to assert claims on behalf of the several species. Accordingly, plaintiff's motion is DENIED and his complaint is DISMISSED without prejudice.

Introduction

Plaintiff Schuyler Van Scoy ("Van Scoy" or "plaintiff") filed this action against defendant Shell Oil Company ("Shell" or "defendant") in September 194, alleging violations of the Federal Endangered Species Act ("ESA"). Specifically, Van Scoy alleges that Shell's selenium discharge violates section 9 of the ESA, 16 U.S.C. sec. 1538, by harming four threatened or endangered species: peregrine falcons, California clapper rails, winter-run chinook salmon, and delta smelts (collectively "the species" or "birds and fish"). Van Scoy asks the Court to enjoin Shell from discharging selenium in its wastewater above certain concentrations.

The matter is currently before the Court on Van Scoy's motion for a preliminary injunction. After reviewing the parties'

submissions on the motion in February 1195, the Court had serious reservations about Van Scoy's standing to assert these claims. Because standing is jurisdictional, the Court ordered the parties to submit supplemental filings addressing the question of whether Van Scoy may proceed with this action.

Background

Van Scoy formerly operated a fishing business in Martinez Harbor, adjacent to a Shell oil refinery in the northern San Francisco Bay Estuary. As part of its normal operations, the oil refinery discharges wastewater containing significant amounts of selenium, an element which is toxic in high quantities. Van Scoy alleges that defendant's selenium discharge threatens the peregrine falcons, California clapper rails, winter-run chinook salmon, and delta smelts. These species, plaintiff claims, are crucial to his fishing business. In the past, plaintiff has run fishing trips on which he and his customers have fished for salmon. Plaintiff testified that he and his customers have also observed California clapper rails and peregrine falcons. Although neither he nor his customers fish for delta smelt, plaintiff claims that any reduction in the number of smelt will reduce the number of salmon because salmon feed on smelt.

Van Scoy sold his boat in May of 1994 and has not run any fishing trips or wildlife tours since then, although he still owns the fishing business. Van Scoy depo., 14:1-25, 31:6-13. Since he sold his boat, Van Scoy has worked as an independent agent for a long-distance phone company. Van Scoy depo., 31:6-13.

On March 7, 1995, Van Scoy was deposed with respect to his standing to maintain the action. When asked how the selenium affects him any differently than it affects the average citizen, Van Scoy replied, "Well, number one, because that's what I did for a living. I partook in what the bay was all about... It was part of my business, and when I return -- as I say, there's always that little if, when and if ... When and if I return. I'd like to return. I'd like to do that again. I'd like it to be the way it was ... I'm hoping that it will be there, and if I'm going to run a business that relies upon not only the fish but relies upon

the wildlife, then I want it to be there." Van Scoy depo. 66:14-67:15.

According to his more recent declaration, plaintiff has since made "concrete plans" to borrow a boat to run a wildlife tour in the fall of 1995. Van Scoy decl., 2:10-18.

Discussion

A. Plaintiff Lacks Standing Personally

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." Allen v. Wright, 468 U.S. 737, 750 (1984). "A central component of Article III's 'case or controversy' requirement is that the litigant must have standing to invoke the power of the federal court." Region 8 Forest Serv. Timber Purchasers v. Alcock, 993 F.2d 800, 805 (11th Cir. 1993, cert. denied, 114 S.Ct. 683. To establish constitutional standing, the plaintiff must satisfy three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural and hypothetical. Second, there must be a causal connection between the injury and conduct complained of. Third, it must be likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1992). The trial court may require the plaintiff to supply further particularized allegations of fact supportive of plaintiff's standing. Warth v. Seldin, 422 U.S. 490, 501 (1974). If the plaintiff cannot establish the three essential requirements, he lacks standing, and the court is without jurisdiction to hear the action. Id. at 502.

Where the plaintiff in an ESA case is not the species itself, but a person claiming to be affected by the harm to an endangered species, establishing injury in fact requires two steps. The plaintiff must show that (1) the species is in fact being threatened, and (2) that the damage to the species will produce imminent injury to the plaintiff. Defenders of Wildlife, 112 S.Ct. at 2137-38. "Imminent injury" is that which is "certainly impending" and not "only an injury at some indefinite future time." Id. at 2138-39 n.2. The Supreme Court has cautioned that there must be a "high degree of immediacy so

as to reduce the possibility of deciding a case in which no injury would have occurred at all." Id.

Plaintiff argues that, as the owner of a fishing business that in the past has run fishing trips and wildlife tours and may do so again in the future, he has both an economic and an aesthetic interest in the species. There is no dispute that observing the endangered species is a cognizable interest under the ESA. Sierra Club v. Morton, 405 U.S. 727, 734 (1972). Plaintiff, however, fails to show an actual or imminent injury to his interest. Rather, plaintiff claims that if the defendant's actions are allowed to continue, he may be deprived of the opportunity to observe the birds and fish in the future, and his business may suffer. As a matter of law, such conjectural and hypothetical allegations of injury do not rise to the level of a cognizable injury in fact.

In Defenders of Wildlife, 112 S.Ct. 2130 (1992), environmental groups sought judicial review of an agency rule that would allegedly jeopardize the habitat of several endangered species. In an attempt to show imminent injury, two members of the environmental groups stated that they had observed the endangered animals in the past, intended to return to the animals' habitat again, and hoped to see the endangered animals in the future. Id. at 2138. The Supreme Court held that, although both members had cognizable interests in observing the animals, they failed to show that they would be imminently injured by damages to the species. Id. The plaintiffs' professed "intent to return to the places they had visited before -- where they will presumedly, this time, be deprived of the opportunity to observe animals of the endangered species -- is simply not enough." Id. "Such 'some day' intentions -- without any description of concrete plans, or indeed any specifications of when the some day will be -- do not support a finding of 'actual or imminent injury'." Id.

Like the plaintiffs in Defenders of Wildlife, plaintiff's alleged injury is purely speculative and not concrete. Plaintiff's own testimony demonstrates that any injury to plaintiff's interest in the fish and birds is "conjectural and hypothetical" and dependent upon his uncertain return to the fishing business.

At his deposition, plaintiff stated, "It was part of my business, and when I do return -- as I say, there's always that little if, when and if ... When and if I return. I'd like to return. I'd like to do that again. I'd like it to be the way it was... I'm hoping that it will be there, and if I'm going to run a business that relies upon not only the fish but relies upon the wildlife, then I want it to be there." Van Scoy depo. 66:14-67:15. Plaintiff may never in fact operate a fishing business again; thus, there may never be an injury to his economic or aesthetic interest in the species. The Court cannot say that plaintiff's injury is "certainly impending." Without an imminent injury, plaintiff lacks standing, and the Court is without jurisdiction to hear the action.1

In an eleventh hour attempt to create standing, plaintiff submitted a declaration to the Court contradicting his recent deposition testimony. At his deposition plaintiff testified that he was "investigating ... getting back into fishing and [] wildlife tours," but did not profess any current plans to do so. Van Scoy depo., 9:12-25. When asked about the prospect of him running fishing and wildlife trips in the future, plaintiff stated that "I'd like to have that happen again. Right now I'm watching to see what happens... I'm not ready to commit myself back to this until I know, until I feel that there is a market there that I can make a living at." Van Scoy depo., 9:15-25. According to his more recent declaration, plaintiff has since made "concrete plans" to borrow a boat to run a wildlife tour in the fall of 1995. Van Scoy decl., 2:10-18. This post hoc attempt to create jurisdiction is unavailing. Standing is determined as of the date the action is filed. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989). A plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct. Defenders of Wildlife, 112 S.Ct. at 2141, n.4. See also J. William Schwarzer et al., Federal Civil Procedure Before Trial, sec. 2:1262 (1994) (subsequent changes or developments do not cure a plaintiff's lack of standing if none exists when the action was commenced).

Moreover, plaintiff cannot use a contradictory declaration to rehabilitate prior, unfavorable testimony.

Radobenko v. Automated Equip. Corp., 520 F.2d 540, 543-44 (9th Cir. 1975). At his deposition plaintiff testified that he may not operate his business again. He may not now attempt to contradict that assertion to cure his standing defect.

The Court is also mindful of the fact that plaintiff has no history of interest in the conservation of the species and instead offers only commercial motivations for enjoining defendant's selenium discharge. Plaintiff's pending personal injury suit against defendant for damages to his commercial fishing business (Van Scoy v. Shell Oil Co., C 93-4383-FMS) only highlights this fact. The Court therefore strikes plaintiff's declaration as lacking credibility and trustworthiness, and holds that plaintiff lacks personal standing for failure to show an imminent injury to his interest in the birds and fish.

B. Plaintiff Lacks Standing to Assert Claims on Behalf of the Endangered Species

Alternatively, plaintiff argues that he has standing because the species have "standing to sue in their own right." Although the species were never named plaintiffs in this action, plaintiff essentially attempts to "piggyback" his own standing by arguing that he is acting on behalf of the species. Plaintiff fails, however, to show that he is a suitable representative of the species.

Prudential limitations on standing require that parties assert their own rights rather than rely on the rights or interests of third parties. Hong Kong Supermarket v. Kizer, 830 F.2d 1078, 1081 (9th Cir. 1987). There is, however, a limited exception to the prudential rule against third-party standing, where the relationship between the litigant and the third parties whose rights he asserts are such that the litigant has acted to protect the rights of the minority and the minority itself. Id. The litigant must be able to convince the court that he would be "as effective a proponent of the third party's rights as they would be." Id. The litigant must show that his interest are "inextricably intertwined" with the interests of the third party. Id. Failure to do so defeats standing. Id.

For example, in Hong Kong Supermarket, 830 F.2d 1078, a vendor attempted to assert the constitutional rights of

its customers. The district court held that the vendor lacked standing to sue on behalf of its customers and the Ninth Circuit agreed, noting that the vendor was not a "suitable champion of its customers' rights." Id. at 1082. Without a close relationship of interests, the Ninth Circuit held there was considerable doubt about the vendor's competence or incentive to frame the issues and present them with the necessary adversary zeal. Id.

Plaintiff cites Region 8 Forest Serv. Timber Purchasers v. Alcock, 993 F.2d 800 (11th Cir. 1993) in support of the proposition that he may assert the rights of the species to establish third-party standing. Ironically, the Eleventh Circuit held in Region 8 that the timber company could not properly assert the interest of its employees to establish the company's own standing. Among other things, the timber company could not show the "strong identity of interests" required to establish third-party standing. Id. at 809-10. If anything, Region 8 confirms that plaintiff cannot rely on the interests of the species to bootstrap his own standing.

Plaintiff fails to make any showing whatsoever that his interests in the birds and fish are inextricably intertwined with their interests as a species. Nor does plaintiff make any showing of a historical interest in the several species or that he has ever acted to protect the species. Plaintiff is not a conservationist, like the plaintiffs in Defenders of Wildlife who were dedicated to the protection and conservation of animals. In fact, plaintiff's claim that, unless the selenium exposure is stopped, he will have less opportunities to catch winter-run salmon demonstrates a conflict of interest, rather than a congruence of interest with the salmon. Having found that plaintiff would not be an effective a proponent of the species' interest, the Court holds plaintiff lacks third-party standing to maintain this action on behalf of the species.

Conclusion

For the foregoing reasons, the Court holds plaintiff lacks standing personally and as a third-party acting on behalf of the species. Plaintiff's motion for preliminary injunction is DENIED and his complaint is DISMISSED without prejudice.

SO ORDERED.

DATED: April 18, 1995

Signed by FERN M. SMITH, United States District Judge

1. Although the Court does not find it necessary to reach the question, the Court has serious reservations about plaintiff's ability to demonstrate redressibility. Defendant's emission of selenium into the bay is approximately one-third of all selenium emitted by the six refineries in the area. Plaintiff's Exh. E, Memorandum of Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction. The selenium emitted by these oil refineries also appears dwarfed in comparison to the selenium emitted by other sources such as agricultural run-off. See Findings of Fact and Conclusions of Law, Sumner Peck Ranch, Inc. v. Bureau of Reclamation, (CV-F-91-048 OWN, Dec. 19, 1994); Order, California Public Interest Research Group v. Shell Oil Co., (C92-4023 TEH, Dec. 22, 1993). As the Supreme Court noted in Defenders of Wildlife, where the defendant is responsible for only a fraction of the alleged injury, the plaintiff must demonstrate that elimination of that fraction will reduce the harm to the species and the plaintiff. 112 S.Ct. at 2142.

Endorse file-stamped on April 18, 1995.